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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DAN MORALES, ATTORNEY GENERAL OF TEXAS,
Petitioner,

v.

TRANS WORLD AIRLINES, INC., *et al.*,
Respondents.

BRIEF OF AMERICAN AIRLINES, INC. AMICUS CURIAE IN SUPPORT OF RESPONDENTS

STEVEN C. MCCRACKEN*
SIDLEY, DIXON & GRUTCHER
600 Newport Center Drive
Newport Beach, Cal. 92660
(714) 759-3600

DAVID A. SCHWARTZ
JOHN G. ALLEN
AMERICAN AIRLINES, INC.
P.O. Box 619616—M.D. 5675
Dallas/Fort Worth Airport
Texas 75261-9616
(817) 967-1234

Attorneys for Amicus Curiae
American Airlines, Inc.

*Counsel of Record

[redacted]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

90-1604

DAN MORALES, ATTORNEY GENERAL OF TEXAS,
Petitioner,

v.

TRANS WORLD AIRLINES, INC., *et al.*,
Respondents.

BRIEF OF AMERICAN AIRLINES, INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST

Amicus curiae American Airlines, Inc. ("American") files this brief because of its strong interest in the subject of this case, and because of its ability to provide information that will be useful to the Court in reaching a just and correct decision.[1]

This case involves the attempt by a group of state attorneys general to regulate the advertising of airline fares under state laws prohibiting deceptive advertising. The Fifth Circuit correctly held that state reg-

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[1] Pursuant to Rule 37.3 of the Rules of this Court, this brief is filed with the consent of Petitioner and of Respondents. Letters of consent from all parties are being filed concurrently with this brief.

ulation of the advertising of airline fares was pre-empted by Section 105(a)(1) of the Airline Deregulation Act of 1978, 49 U.S.C. App. § 1305(a)(1). This Court has agreed to review that decision in response to a Petition for a Writ of Certiorari filed by the Attorney General of Texas.

American has a special interest in this issue because:

(1) American is the largest domestic airline and one of the largest airlines in the world, doing business in all 50 states and many foreign countries. If the states are permitted to "re-regulate" the airline industry, American will be one of the airlines most directly affected.

(2) American spends in excess of $100 million dollars each year to advertise and promote its services in the U.S., with much of that directed to the advertisement of airline fares.

(3) American is a Texas-based corporation, with its largest hub operation at Dallas/Fort Worth Airport, and with operations throughout Texas. Thus, the actions of the Attorney General of the State of Texas regarding the applicability of Texas state law to airline advertising will have a significant and direct impact on American.

(4) American has litigated the issue of pre-emption under the Airline Deregulation Act before many courts, and is very familiar with the applicable cases, statutes and principles. For example, American argued this issue successfully before the Seventh Circuit in *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889 F.2d 751 (7th Cir. 1989). This Court

denied certiorari in *Illinois Corporate Travel*. *See* ___ U.S. ___, 110 S.Ct. 1948 (1990).

(5) American has been a leader in introducing heavily discounted, but restricted fares. American was the first to introduce the now familiar "Super Saver" fares that are used by so many travelers. American continues to be an innovator in this area, and owes much of its competitive success to its farsighted approach in this area. The use of such fares, and the benefits they provide to travelers, are threatened by the actions of the state attorneys general.

(6) American's advertising has not been the target of any enforcement action by the state attorneys general. Thus, American's concerns regarding this case are broader than the specific advertising practices used by other airlines that are in dispute, and American can direct the Court to these broader concerns.

For these reasons, American respectfully submits this Brief *Amicus Curiae* in support of Respondents and in favor of affirming the decision of the Fifth Circuit.

SUMMARY OF ARGUMENT

American agrees with Respondents that the plain meaning of the "relating to" language of Section 105(a)(1) pre-empts state laws that have "a connection with" routes, rates, or services, even if that connection is indirect. The language of the statute, its legislative history, the interpretation given to that language by the agencies charged with its enforcement, and this Court's prior decisions interpreting essentially the same words in a different statute enacted by Congress at about the same time, all support

Respondents' position and argue in favor of the affirmance of the Fifth Circuit's decision.[2]

However, this case can be decided in favor of Respondents, and consistent with the decision of the court below, on a much narrower ground. It is conceded by Petitioner, as it must be, that direct state regulation of airline fares would "relate to" routes, rates or services within the meaning of Section 105(a)(1). But there can be little doubt that the regulation of airfare advertising by fifty state attorneys general and countless state court judges will inevitably lead to a reduction in advertising and a decline

[2] The Fifth Circuit's decision is consistent with the decision of the only other Circuit that has addressed the same issue. In *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889 F.2d 751, 754 (7th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1948 (1990), the Seventh Circuit concluded that "[p]rice advertising surely 'relates to' price," and any attempt to use state law to void restrictions imposed on a travel agent by an airline regarding the advertising of fares was pre-empted by Section 105. *See also New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d 157, 173 (1st Cir. 1989); *O'Carroll v. American Airlines, Inc.*, 863 F.2d 11, 13 (5th Cir.)(per curiam), *cert. denied*, 490 U.S. 1106 (1989); *Anderson v. USAir, Inc.*, 818 F.2d 49, 57 (D.C. Cir. 1987). The Ninth Circuit's decision in *West v. Northwest Airlines, Inc.*, 923 F.2d 657 (9th Cir. 1990), *petition for cert. pending, No. 91-505*, which is relied upon heavily by Petitioner, relates to overbooking and not fares and, in any event, is wrongly decided. Other panels in the Ninth Circuit do not appear to follow it. *See, e.g., Federal Express Corp. v. California Public Utilities Comm'n*, 936 F.2d 1075 (1991), *petition for cert. pending, No. 91-502*. Moreover, *West* is not consistent with earlier Ninth Circuit decisions. *See Air Transport Ass'n of America v. Public Utilities Commission*, 833 F.2d 200, 207 (9th Cir. 1987), *cert. denied*, 487 U.S. 1236 (1988); *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408, 1415 (9th Cir. 1984).

in airline fare competition. Such regulation would increase the cost of introducing, implementing and promoting discount fares, would slow or make impossible the ability to introduce new fares as a competitive response to price initiatives implemented by other airlines, and would result in fewer discount fares and higher prices. Thus, the regulation of airline fare advertising is, in practical effect, the *direct* regulation of the fares that airlines can charge, and therefore any attempt by the states to regulate airline fare advertising is clearly pre-empted by the express language of Section 105(a)(1).

Regulating what an airline can say about its rates will have a direct impact on the underlying rates themselves. In 1989,the Department of Transportation ("DOT") made clear its view that regulation of airline price advertising by the states would "significantly affect airline rates, routes and services." *See* Notice of Proposed Rulemaking, 54 Fed. Reg. 31,054 (1989). It was the expert opinion of the DOT that state regulation of airline price advertising "would tend to limit airline price competition," and would make it "virtually impossible to put together nationwide advertising programs," with the result that "[p]rice competition would suffer, thus depriving consumers of lower fares." *Id.*, 54 Fed. Reg. 31,053, 31,054. In opposing certiorari in this case, the United States similarly stated that "there is a direct, immediate, and strong relationship between advertising and price." Brief for the United States as *Amicus Curiae*, at p. 9. The Seventh Circuit, in a similar case decided consistently with this case, observed that "to forbid the advertising of discounts is to set price (at least to influence it), a proposition with substantial

support in both law, . . . and economics." *Illinois Corporate Travel, Inc. v. American Airlines, Inc., supra,* 889 F.2d at 755. *C.f.,* Note, *The Risk of Chill: A Cost of the Standards Governing the Regulation of False Advertising Under Section 43(a) of the Lanham Act,* 77 Va. L. Rev. 339 (1991).

The connection between airline fare advertising and airline fares themselves flows from the competitive realities of the airline industry, as unleashed by Congress through the Airline Deregulation Act. In this brief, American provides the Court with information about the operation of the airline industry and the advertising of airline fares in order to show why regulation of fare advertising would directly affect airline fares in a way that would injure the public and frustrate the intent of Congress as declared in the Airline Deregulation Act.

Since deregulation in 1978, the airlines have competed using pricing that is uniquely suited to the economics of the industry. By offering a series of fares with increasing degrees of restrictions, airlines can maximize their ability to attract discretionary and marginal traffic while maintaining their existing revenue base. The result has been a net decline in the cost of air travel in real dollars for American travelers.

This was exactly what Congress intended when it deregulated the industry. Congress wanted innovative price initiatives and vigorous price competition. It wanted airlines to introduce and promote discounts to the public. To assure this would happen, Congress placed all authority over matters relating to airline rates in the hands of the DOT, instructed that agency to give primary importance to competitive concerns,

and pre-empted any intermeddling in this process by state regulators.

Regulation of airline fare advertising by multiple jurisdictions, some with conflicting policies and requirements, would reverse the benefits that have resulted from deregulation and would frustrate Congress' intent for no reason because, contrary to the charges of the Petitioner, Congress did not create a regulatory void when it barred the states from regulating air fare advertising. Understanding the potential need for government controls, Congress granted such power to the DOT, and the DOT has exercised that power in accord with uniform national policies and regulations.

For these reasons, as set out in more detail below, American urges the Court to affirm the Fifth Circuit and find that the Airline Deregulation Act pre-empts the regulation of airline fare advertising pursuant to state deceptive advertising laws.

ARGUMENT

I. CONGRESS INTENDED TO PRE-EMPT ALL STATE REGULATION THAT WOULD DIRECTLY INTERFERE WITH THE AIRLINE PRICE COMPETITION DEREGULATION WAS TO FOSTER

Section 105 of the Airline Deregulation Act contains an express pre-emption clause. That clause limited the scope of a narrow saving clause found at Section 1106 that had been passed 40 years earlier. In transferring the authority to regulate unfair or deceptive practices in the airline industry under Section 411 to the DOT in 1984, Congress reaffirmed its intent to pre-empt any state regulation relating to airline rates, including the regulation of airline fare

advertising. Without question, any regulation by the states having a direct impact on airline fares was prohibited by Congress.

A. SECTION 105—THE PRE-EMPTION CLAUSE

Section 105 is an express pre-emption clause of broad scope. It prohibits all state regulation "relating to rates, routes, or services of any air carrier." Congress could not have spoken more clearly or more broadly in announcing its intention to pre-empt, at a minimum, all state regulation that has a direct impact on airline fares. This Court has held the words "relate to" in a pre-emption clause are to be interpreted broadly to pre-empt all state law "even if the law is not specifically designed to affect [the pre-empted area], or *the effect is only indirect.*" *Ingersoll-Rand v. McLendon*, ___ U.S. ___, 111 S.Ct. 478, 483(emphasis added). *See also Illinois Corporate Travel, Inc. v. American Airlines, Inc., supra*, 889 F.2d at 754 (phrase "relating to" in Section 105 of the Airline Deregulation Act "substantially increases the extent of preemption").

The fact that Congress placed a pre-emption clause in the Airline Deregulation Act is significant in itself. Prior to deregulation, the states had concurrent jurisdiction over some matters relating to airlines. *See Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976).[3] The inclusion of a pre-emption clause in the

[3] While *Nader* is heavily relied upon by Petitioner and *Amici* supporting Petitioner, the case has little relevance. It was an *implied* pre-emption case decided before passage of the Airline Deregulation Act. Moreover, the subject matter of the case—overbooking—involved an area where the Civil Aeronautics Board had expressly granted to consumers the right to pursue common law remedies. *See Nader v. Allegheny Airlines, supra*, 426 U.S. at 294-95, 306 n.16, 307 n.18. Even after deregulation and the transfer of authority to the Department of Transportation, this special treatment of overbooking cases continues because of express federal regulations on the subject. *See* 14 C.F.R. §250.9 (giving consumers the option of either accepting denied boarding compensation offered by a carrier or seeking "to recover damages in a court of law or in some other manner.").

Airline Deregulation Act was a dramatic change in that situation.

In adding a pre-emption clause pursuant to Section 105 of the Airline Deregulation Act, Congress used language that is a template of how to phrase a pre-emption clause when full pre-emption is intended. The statute pre-empts all state regulation "relating to" rates. 49 U.S.C. App. §1305(a)(1). In *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983), *Pilot Life Insurance Company v. Dedeaux*, 481 U.S. 41 (1987), *Metropolitan Life Insurance Company v. Taylor*, 481 U.S. 58 (1987), *FMC Corp. v. Holliday*, ___ U.S. ___, 111 S.Ct. 403 (1990), and *Ingersoll-Rand v. McLendon*, ___ U.S. ___, 111 S.Ct. 478 (1990), this Court interpreted Section 514(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1144(a), which provides for the pre-emption of state laws that "may now or hereafter *relate to* any employee benefit plan," as a clear expression of Congress' intent to provide for exclusive federal control. In *Ingersoll-Rand*, for example, the "relate to" language of Section 514(a) is described as "conspicuous for its breadth" and "deliberately expansive," and the Court gave the phrase a "broad, common-sense meaning." *Ingersoll-Rand v. McLendon, supra*, 111 S.Ct. at 482-83. Section 105(a)(1) of the Airline Deregulation Act, 49 U.S.C. App. §1305(a)(1), uses almost identical lan-

guage, is part of a comprehensive regulatory scheme, and reflects a choice by Congress of language with a broad pre-emptive effect over less inclusive language.

Amici in support of Petitioner contend that the Court should not give the same words the same meaning when used by Congress in different statutes, and suggest the Court should instead interpret each statute *sui generis* based upon the application of a long list of sweeping principles and "maxims" of statutory construction that are often vague and self-contradictory. Brief of Public Citizen and Aviation Consumer Action Project As *Amici Curiae* Supporting Petitioner ("Brief of *Amici*") at pp. 9-13. Although such rules of statutory construction have their place, they should not be used as a justification for judicial activism and the usurpation of the legislative function by the Courts. If the extreme position of *Amici* is accepted, then no matter what words are used, no one, not even Congress, would know what a statute meant until this Court had a chance to filter the legislation through the many subjective tests contained in these maxims of jurisprudence.[4]

Here, two sweeping statutes passed within four years of each other use essentially identical words in pre-emption clauses aimed at preserving uniform federal regulation. This Court has found the language to

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[4] *Amici* argue that one must use the panoply of legal maxims to "divine congressional intent." Brief of *Amici* at p. 9. Those that promote the overuse of these principles find the language of all legislation to fall short of a "model of clarity," thereby providing fertile ground for judicial reconstruction. This fosters a form of judicial activism that is not consistent with the separation of powers concept embodied in the U.S. Constitution.

be broad and inclusive when used in the first statute. To give those words a different meaning in the second would be wrong. *See Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 65 (1987) (It is presumed that "similar language in two . . . statutes has a similar meaning"). *See also Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress"); *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985).

Significantly, Congress selected the broad language of Section 105 after rejecting less encompassing language contained in an earlier Senate version of the bill. *See Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408, 1416 n.11 (9th Cir. 1984). *Amici* supporting Petitioner contend that the language of the Senate version of the Airline Deregulation Act demonstrates a Congressional intent to prohibit only "utility-type" regulation of airlines by the states. Brief of *Amici* at pp. 17-18. Indeed, the Senate version limited pre-emption to state regulations "*determining* routes, schedules, or rates, fares, or charges in tariffs." But Congress rejected the Senate version of the bill, and instead inserted much broader language in the final bill, making it clear that more than utility-type regulation of fares was pre-empted. The final version of the statute used the language "relating to" to go beyond utility-type regulation and to prohibit state regulation of any type that might restrict the vigorous price competition Congress intended to unleash with deregulation.

The pre-emption clause found in the Airline Deregulation Act is part of a comprehensive scheme to redirect the U.S. airline industry. To accomplish that goal, Congress gave certain authority to the DOT and provided clear instructions on how that authority was to be exercised.[5] Regarding airline fares and fare advertising, Congress told the DOT to exercise its authority "in the interest of the public," 49 U.S.C. App. §1381(a), and defined the public interest to include "maximum reliance on competitive market forces," 49 U.S.C. App. §1302(a)(4). If the states had concurrent jurisdiction over airline rates, routes and services, they would not be subject to these same directions and Congress' intentions could be thwarted. Congress knew this when it added the broad language of Section 105. *See* H.R.Rep. No. 1211 at 15-16; 1978 U.S. Code Cong. & Admin. News at 3751-52 (pre-emption provision added to "prevent conflicts and inconsistent regulations").

Interpreting Section 105 as Petitioner urges would directly contravene Congressional purpose. The Airline Deregulation Act was specifically intended to eliminate regulatory constraints on price competition that had existed in the past, and to encourage discount fares. *Id.*, at 2-4. Congress prohibited federal regulators from interfering with competitive forces. All of this would have gone for naught if Congress had left the door open for the states to come back

[5] Authority was initially assigned to the Civil Aeronautics Board (the "CAB"). The CAB was eventually disbanded, and all remaining authority was transferred to the DOT. For convenience, this Brief will use "DOT" to refer to both agencies unless the context is such that a distinction is of substantive importance.

in and re-regulate the airlines. *See New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d 157, 173 (1st Cir. 1989)("Congress obviously did not intend to leave a vacuum to be filled by the Balkanizing forces of state and local regulation.").

Thus, there is ample support for the conclusion that Congress intended to pre-empt any state regulation that had even an indirect effect on airline fares and airline price competition. However, this Court need not determine the outer boundaries of the pre-emption clause to decide this case. At the very least, Congress intended to pre-empt those state laws that have a *direct* impact on airline fares.

B. SECTION 1106—THE SAVING CLAUSE

The original federal statute regulating the airline industry was passed in 1938, and contained a "saving clause" at Section 1106, 49 U.S.C. App. §1506. The provision was limited to those state remedies "now existing." This saving clause remains in effect today, but does not limit the scope of the pre-emption clause passed by Congress in 1978. The effect of the saving clause is to preserve from implicit pre-emption state remedies that do not relate to rates, routes or services.

The pre-emption lause in Section 105 and the saving clause in Section 1106 coexist comfortably. The more recently passed pre-emption clause is directed specifically to the areas of rates, routes and services—the areas where Congress wanted to stimulate competition under uniform policies implemented by the DOT. As other courts have also concluded, the saving clause preserves state remedies from implicit pre-emption, but not from express pre-emption. *See Illi-*

nois Corporate Travel, Inc. v. American Airlines, Inc., *supra*, 889 F.2d at 754; *O'Carroll v. American Airlines, Inc.*, 863 F.2d 11, 13 (5th Cir.)(per curiam), *cert. denied*, 490 U.S. 1106 (1989); *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408, 1416 n.11 (9th Cir. 1984).[6]

Clearly, the pre-emption clause added in 1978—40 years after the saving clause—must be given priority over the saving clause. To argue the contrary would suggest that a statutory provision of general language, inserted at the end of a statute as a "catch all" provision, should take precedence over a substantive provision contained in the body of the statute and expressly directed to the heart of the deregulation legislation. This saving clause, like all saving clauses, must be read as secondary to, and limited by, the express actions of Congress in the body of the legislation. *See International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987) ("we do not believe Congress intended to undermine this carefully drawn statute through a general saving clause"); *Busic v. United States*, 446 U.S. 398, 406 (1980)(a specific statute controls over a general enactment). *See also Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 714, 740 (1985) ("While Congress occasionally

[6] American does not contend that all state laws that might conceivably have a relationship with the airline industry are pre-empted. *Amici* in Support of Petitioner list a "parade of horribles" suggesting that state laws relating to everything from air crashes to spilled coffee will be pre-empted under the theory put forward by Respondents. Brief of *Amici* at pp. 9-10. This overstates the position taken by Respondents. In any event, it totally misses the mark when considered in light of the narrower pre-emption analysis suggested here.

decides to return to the States what it has previously taken away, it does not normally do both at the same time.").

Even if the saving clause acted as a limitation on Congress' intent as expressed in the pre-emption clause, it would not preserve any claims under the Texas statute at issue in this case. The saving clause enacted in 1938 had a narrow focus. It only preserved those remedies "now existing at common law or by statute." The Texas statute was not in existence in 1938, and would not have been saved.[7]

Ultimately, however, this case can be decided on a more narrow ground. There can be no doubt, as discussed above, that the pre-emption language of Section 105 expressly pre-empts state regulation that *directly* affects fares. While the saving clause might preserve other state remedies in other areas, no rational reading would permit a construction whereby the saving clause would directly contradict the pre-emption clause.

C. SECTION 411—UNFAIR OR DECEPTIVE PRACTICES

In 1984 Congress transferred the power to control unfair or deceptive trade practices in the airline industry from the Civil Aeronautics Board (which was being disbanded) to the DOT. In doing so, Congress did not intend to permit any regulation of the competitive process that would deny the public the full

[7] Not only was the Texas statute in question not in existence at the time the saving clause was enacted, but neither were any of the deceptive advertising statutes of the 31 other states that have supported Texas in this action as *amici*, at least as those statutes are currently constituted. Thus, none of these states can rely upon the saving clause.

benefits of competition in the airline industry. It had instructed the DOT to give "maximum reliance on competitive market forces," 49 U.S.C. App. §1302(a)(4). At the time of the transfer of authority to the DOT, Congress again repeated its intention to provide uniform federal regulation without interference by the states. *See* H.R. Rep. No. 793 at 4; 1984 U.S. Code Cong. & Admin. News at 2860 ("federal regulation insures a uniform system of regulation and pre-empts regulation by the states").

Nothing connected with the transfer of authority under Section 411 from the CAB to the DOT suggests that the pre-emption clause in Section 105 was intended to be read narrowly. Indeed, the opposite is true.

II. THE APPLICATION OF STATE LAWS AND REGULATIONS TO AIRLINE FARE ADVERTISING WOULD HAVE A DIRECT AND SIGNIFICANT IMPACT ON AIRLINE FARES BECAUSE IT WOULD UNNECESSARILY REDUCE THE AMOUNT OF PRICE INFORMATION MADE AVAILABLE TO CONSUMERS, REDUCE THE NUMBER AND TYPE OF DISCOUNT FARES OFFERED BY AIRLINES, AND REDUCE PRICE COMPETITION IN THE AIRLINE INDUSTRY

As Judge Easterbrook wrote for the Seventh Circuit, "price advertising surely 'relates to' price," and the regulation of airline fare advertising "relates to" airline fares in the most direct sense. *See Illinois Corporate Travel, Inc. v. American Airlines, Inc., supra,* 889 F.2d at 754-55. *See also* discussion at pages 5-6, *infra,* and authorities cited there. The airline industry offers a large number of different fares characterized by increasing degrees of restrictions. These fares are introduced quickly in response to competitive moves in the marketplace, and are promoted nationally. Overall, this fare environment has benefited consumers. The micro-management by the states of the advertising of fares would not only restrict the amount of information available to the public about fares (thereby reducing their functional availability), but would result in the elimination of certain fares.

A. INNOVATIVE ATTEMPTS BY AIRLINES TO COMPETE ON PRICE IN A DEREGULATED ENVIRONMENT ARE OFTEN NECESSARILY COMPLEX

The many fares used by the airline industry are not the result of happenstance. They reflect a special economic environment influenced by the following three factors, among others:

(1) Airlines have high fixed costs associated with operating a complex, interconnected network of scheduled flights. Major cost categories include aircraft and fuel, flight crews and ground personnel, airport terminals and maintenance facilities, and marketing, management and capital costs.

(2) Once a decision has been made to provide a flight between two cities, the marginal cost of adding one more passenger to that flight (assuming there is an available seat and therefore no need to add a new or larger aircraft) is small. Industry load factors (*i.e.*, the percentage of seats filled) generally average around 60 to 65%.

Facing high fixed costs and low marginal costs, airlines establish their basic fares in the hope of attracting enough passengers to cover their fixed costs, including a reasonable return on their investment. Having done that, airlines can then consider if it is possible to attract additional passengers by offering

them lower fares, while still retaining the revenue base needed to cover their fixed costs. The solution has been to offer lower fares that are restricted. *See generally,* J.P. Schwieterman, *Fare is Fair in Airline Deregulation: Restrictions and the Pursuit of Allocative Efficiency,* Regulation (Summer 1991), at pp. 29 *et seq.*

Restricted fares reflect the fact that airline service can be separated into different "products" that can be sold to different people at different prices. Thus, the person who wants the ability to travel at any time, on any flight can purchase an unrestricted ticket. However,the passenger who wants to pay the least amount possible, but is willing to book in advance, travel only at certain times, and accept other limitations, can purchase a restricted discount ticket. The offering of a lower, restricted fare does not fully dilute the revenues that would be earned from the higher, unrestricted fare, because those travelers paying the higher price want to purchase an airline "product" that is different and presumably worth more in their eyes.

The use of restrictions in association with discounted fares is critical. If the discounted fares were offered on the same terms as the full fares, then no one would ever purchase a full fare ticket and the airline's revenue base needed to cover its fixed costs would erode. Accordingly, as airlines reduce the fares for seats on a particular flight, they must impose additional restrictions in order to make those fares unattractive to passengers who would otherwise pay a higher fare. Each further reduction in fare for a seat on a particular flight must bring an increased

restriction in order to function within this fare environment.

The types of restrictions that might be used can vary, and are driven by the marketplace. There may be restrictions on when the trip must begin, when it must end, or the days of the week during which travel is permitted. There may be "black out" periods, or restrictions on the number of seats on a particular flight that are available at the reduced fares. Some reduced fares may be available on particular flights only if that flight has not been filled with higher fare passengers at or near the time of departure.[8]

The traveling public has benefited from the use of restricted discount fares. Today, over 90% of all travelers use some form of discount fare. Moreover, a DOT Task Force on the Airline Industry found that air fares *declined* 28% between 1978 and 1989 when measured in real (*i.e.*, inflation adjusted) dollars. Since deregulation the number of fares published through computerized networks has increased from about one million to over 50 million fares. By making air travel more affordable to more people, the airline industry

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[8] This latter practice is what the airline industry calls "yield management." Yield management techniques monitor how well a flight is "selling" during the days, weeks and months before it is scheduled to depart. At various times before departure, the booking patterns on the flight are studied, and an informed judgment is made as to whether the number of seats available in each fare category should be adjusted. If the flight is not selling well, more heavily discounted, but restricted, seats might be offered. If the flight is filling up, the remaining seats might be saved for last minute business travelers that are prepared to pay full fare for a premium product. Thus, at any given time, the number of seats available at any fare level on any particular flight may be different.

has been able to offer more choices and to keep fares down overall—just as Congress intended when it deregulated the industry.

Today, the competitive airline marketplace offers a host of different types of fares that reach out to all segments of the traveling public. Many of these fares are characterized by a series of restrictions that permit them to function efficiently within the overall scheme of airline pricing. Because of this complexity, which is driven by the economics of the industry, it has become increasingly more difficult to communicate in any single advertisement all of the details concerning a fare, while at the same time keeping the advertisement sufficiently short and direct to make it an effective competitive tool available at a reasonable cost and on a timely basis.

B. REGULATION OF AIRLINE FARE ADVERTISING BY THE STATES WOULD INCREASE THE COST OF IMPLEMENTING AND PROMOTING RESTRICTED DISCOUNT FARES, WOULD DELAY THEIR INTRODUCTION IN COMPETITIVE SITUATIONS, AND WOULD DISCOURAGE OR LIMIT THE USE OF SUCH LOWER FARES TO THE DETRIMENT OF THE TRAVELING PUBLIC AND THE AIRLINE INDUSTRY.

The regulation of airline fare advertising by the states would reduce airline advertising and ultimately cause a decline in the intensity of airline fare competition. A promotional fare is not effective unless it generates additional traffic, and it cannot generate traffic unless consumers learn about it through advertising. If such fares cannot be promoted efficiently, then they will become less attractive and their use as a competitive tool will decline.

1. The Lack Of Regulatory Uniformity Caused By State Regulation Of Fare Advertising Would Increase Advertising Costs Associated With Restricted Discount Fares, And Deter The Introduction And Use Of Such Fares

The states contend that they should be permitted to dictate the precise content and format used in advertising relating to discount fares. While acting together through the National Association of Attorneys General for the moment, each state asserts that it is free to apply its own disclosure requirements to airline advertising.[9] Regulation of airline fare advertising by multiple sovereigns would seriously undermine the ability of airlines to compete effectively as to price, and frustrate the intent of Congress under the Airline Deregulation Act.

American does business in all fifty states. It advertises in 184 newspapers published in 40 different states, including national publications such as the Wall Street Journal, USA Today and the New York Times. American broadcasts advertisements on television in

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[9] In fact, the NAAG Guidelines do not provide for uniformity in the application of state laws to airline fare advertising. The application of the Guidelines by the attorneys general themselves is "subject to individual prosecutorial discretion and variations in individual state and common law." Brief of Petitioner at p. 6. Moreover, many state deception laws give private causes of action to individuals, who would not be bound by the NAAG Guidelines in any way. These individuals could seek to have state court judges, who may know nothing of NAAG and who certainly are not bound by its Guidelines, impose even stricter standards upon airlines. Thus, even if the attorneys general remain uniform under the NAAG Guidelines (which is unlikely), the laws of the states as applied by state courts will almost certainly evolve along non-uniform lines based upon individual decisions in private cases.

fourteen cities in eleven states using fifty to sixty different stations. Moreover, American also broadcasts its ads on 916 radio stations in 135 cities in 40 states. Currently, American checks its fares and its fare advertising to guarantee that they are legal under uniform DOT guidelines. At times this entire process must be completed in a matter of hours in order to respond to a fare initiative offered by a competing airline. It takes between 48 and 72 hours lead time to prepare a print or radio ad, and between 72 and 96 hours to prepare a television spot.

If each of the fifty states gains the power to regulate fare advertising in accordance with its own statutes, regulations, court decisions, and common law, then airlines must add the following steps to the process of developing, implementing and promoting new fares:

(1) Any new fare must be evaluated in light of the laws of all fifty states to determine if it meets minimum disclosure requirements for offering in each state in light of its proposed restrictions.

(2) Any advertising copy for the new fare must be evaluated by lawyers familiar with the laws of each of the fifty states to assure compliance with the disclosure requirements of each state.

(3) Advertising copy would need to be individually prepared for each newspaper, radio station, and television station depending on where the advertisement is to be disseminated. In some areas media markets cross over state lines (*e.g.*, the areas around New York City, Washington, D.C., Kansas City, St. Louis, etc.). Other publications reach national audiences. In such cases, special efforts will be required to either

develop a customized advertisement or insert, or fall back to a "least common denominator" form of ad copy.

(4) Extra time and effort would be required to explain to travel agents, passengers and others that the fare described in one state is really the same as that set forth in advertising that is different in a neighboring state.[10]

Obviously, these extra steps and requirements will impose extra costs. Moreover, where there is the need to move quickly to respond to a fare initiative offered by a competitor, these additional burdens will either result in even greater costs, or will prevent a timely response altogether.

The alternative to incurring these extra costs and delays is to offer fewer discount fares, with fewer restrictions, and to promote them less—a very real possibility given the chilling effect caused by uncertainty regarding how the courts of 50 different states might enforce their consumer protection laws. Instead, airlines would emphasize less restricted (and more expensive) fares that can be introduced quickly and promoted easily in generic advertisements.

Whichever alternative is selected, the result is less information and fewer options for consumers at

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[10] A problem exists even in the unlikely event that all of the states impose the same advertising rules, because the states are not guided by the Congressional mandate to balance competitive concerns with disclosure requirements. *See* Argument, Part I.C, *supra*. Increasing the amount of information that must be contained in any advertisement of a restricted fare, even if done on a uniform basis, will increase the cost of such advertising and reduce the amount of such advertising--thereby reducing the amount of price competition in the marketplace.

greater cost. As restricted discount fares become more costly and time consuming to implement when compared with non-restricted, less-discounted fares, fewer of the restricted fares will be introduced. Remaining fares will need to be increased, to the extent permitted by competition, to cover the increased costs imposed by regulation. If fares cannot be increased due to competition or other market forces, the increased costs will contribute to the further deterioration of the financial performance of the U.S. airline industry.

2. The Type Of Regulation Currently Proposed By The States Would Effectively Eliminate Many Existing Discount Fares

It would be extremely difficult, and in many cases impossible, to advertise reduced fares if the advertisement itself had to disclose every restriction on that fare. As the United States has noted:

> The convergence of increasing price competition and increasing fare complexity raises difficult issues from the standpoint of regulating price advertising . . . As price advertising becomes an increasingly important element in the marketplace for air travel, it becomes increasingly difficult to convey in any advertisement the full complexity of the fare structure and ticket restrictions, while keeping the advertisement sufficiently short and clear so that it can serve as an affordable and effective price competition tool.

Brief for the United States as *Amicus Curiae*, at p. 10. The Association of National Advertisers commented during DOT rulemaking proceedings that the NAAG Guidelines "effectively bars all 15-second advertisements for air fares and creates significant clutter problems in a 30-second spot." DOT Docket 46410, Comments of the Association of National Advertisers, Inc., at pp. 4-5.

Obviously, if more information about restrictions must be included in an advertisement, either the advertisement must grow larger (if a print ad) or longer (if a radio or television ad), or some existing information must be deleted. Either way, the cost of advertising is increased. Because restricted fares would require the greatest amount of ad space or ad time to promote, they would be the most expensive fares to promote. As the most expensive fares to promote (as well as the fares that generate the least revenue per passenger), they would be promoted the least, or would be abandoned altogether for fares that can be promoted more efficiently. Indeed, restricted discount fares, by their very nature, rely more heavily upon effective promotion to the public than standard, full fares that are generally paid by non-discretionary travelers. The result would be the elimination of certain discounted fares as a result of state regulation of what must be said about those fares to the public.

C. THERE IS NO NEED FOR STATE REGULATION OF AIRLINE FARE ADVERTISING IN LIGHT OF THE ONGOING CONTROL EXERTED BY THE DEPARTMENT OF TRANSPORTATION

In many ways the airline industry is unique in the amount of free information and assistance provided to consumers prior to purchase. There is obviously extensive advertising by all sellers. But beyond that, the industry provides a consumer with a travel agent or a trained sales agent who acts at no cost to the consumer as an advisor and consultant prior to pur-

chase.[11] The agent represents all sellers in the market, and has the authority to offer every product available. Moreover, in most cases the agent has instantaneous access through a computerized reservation system to information about every option and every price offered in the marketplace. No other industry offers such an abundance of competitive information—all of which is available free prior to purchase.

Furthermore, Congress has empowered the DOT to intervene against "unfair or deceptive practices" pursuant to 49 U.S.C. App. §1381, and the DOT has vigorously exercised that power. In 1991 the DOT fined scheduled airlines several times for allegedly deceptive consumer practices—imposing the highest total in fines since the DOT began tracking such things five years ago. The DOT has also been pursuing other regulatory techniques, including rulemaking, to provide uniform guidance and control in this area. *See* 54 Fed. Reg. 31,052 (1989)(notice of proposed rulemaking re advertising of airline fares).[12]

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[11] Over 80% of all air travel is ticketed through travel agents. More than 90% of all travel agents in the United States are automated with some computerized reservation system. American's computerized reservation system, SABRE, is the largest of these systems. Agents using SABRE have access to information about the flights of essentially every airline in the world, all available fares, and can even ask the computer to automatically search for and locate the lowest available fare for any itinerary. SABRE competes in the United States with three other computerized reservation systems that provide similar services to travel agents and consumers.

[12] Petitioner accuses the DOT of either failing to enforce federal consumer protection laws, or of going so far as to "circumvent" them. Brief of Petitioner at pp. 26-27. The record of enforcement actions initiated and successfully concluded by the

With the availability of free pre-purchase information from travel agents and other sources, and the active regulation by the DOT, there is simply no need for the states to impose all of the burdens of additional regulation under the laws of each of 50 different states.[13]

III. IF THE COURT DECIDES THAT THE REGULATION OF AIRLINE FARE ADVERTISING IS NOT PREEMPTED, IT SHOULD MAKE CLEAR IT IS NOT ADDRESSING STATE LAWS THAT PURPORT TO DICTATE AIRLINE RATES AND SERVICES

American is currently involved in a case pending before the Illinois Supreme Court captioned *Wolens, et al. v. American Airlines, Inc.* (Case No. 71418, Ill. S. Ct.). In that case, the plaintiffs are attempting to

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DOT refutes the first charge. The second charge reflects a difference of opinion between the DOT and Petitioner regarding how much government regulation of the free market is optimum. The DOT's conservative and informed intervention in the competitive process is more consistent with the role Congress mandated in the Airline Deregulation Act than the micro-management approach suggested by Petitioner. *Amici* Public Citizen, *et al.*, imply that the DOT has not monitored airline advertising by discussing only the rulemaking efforts that are in process. Brief of *Amici* at pp. 5-6. *Amici* ignore the case-by-case enforcement that has occurred.

[13] The Court has been made aware of the pendency of rulemaking proceedings relating to airline fare advertising before the DOT. *See* Brief of *Amici* at pp. 5-6. Once the DOT acts, it will have expressly pre-empted any state regulation of airline fare advertising pursuant to its final rule, making the application of the "relating to" language to fare advertising a moot issue. One option available to the Court in this case that provides a basis for decision that is even more narrow than that suggested by American is to deny certiorari in this case as improvidently granted, and permit the DOT to occupy this area by regulation.

use state common law and the state deceptive practices act to dictate the number of seats that American makes available for members of its frequent flyer program on specific flights, and to preclude the use of "blackout" dates on which tickets cannot be purchased with frequent flyer credits. That case presents an even narrower question than the one presented to this Court because it involves the use of state law to dictate not only what airlines say, but what they do. Even if the Court were to rule (incorrectly, in American's view) that Section 105 does not pre-empt state efforts to regulate airline fare advertising, it would still certainly be the case that the claims at issue in the *Wolens* case would be pre-empted. At the very least, the Court should expressly leave this question open.

CONCLUSION

Notwithstanding our nation's deep commitment to the concepts of federalism and retained state sovereignty, this is a case where Congress has exercised its authority under the Constitution to establish federal regulation as the supreme, and the exclusive, law of the land. Congress has done so for good reason, and the results have benefited consumers with lower fares and the best air transportation system in the world. Any interpretation of the Airline Deregulation Act that would permit concurrent state authority over the advertising of airline fares would do serious damage to a fundamental concept of our federal system: The deference of the judicial branch to the legislative branch in the enactment of new laws. Moreover, increased state regulation of the airlines would be contrary to our nation's strong commitment to free

market principles and competition. *See Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4 (1958) (competition creates an economic environment "conducive to the preservation of our democratic political and social institutions").

Thus, the Fifth Circuit's decision below should be affirmed, and the current system of balanced, exclusive federal regulation over airline fare advertising should be preserved.

*STEVEN C. MCCRACKEN
GIBSON, DUNN & CRUTCHER
800 Newport Center Drive
Newport Beach, California 92660
(714) 759-3805

DAVID A. SCHWARTE
JANE G. ALLEN
AMERICAN AIRLINES, INC.
P.O. Box 619616—M.D. 5675
DALLAS/FORTH WORTH AIRPORT
Texas 75261-9616
(817) 967-1234

Attorneys for Amicus Curiae
American Airlines, Inc.

**Counsel of Record*

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